

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., AND QWEST INC.	DOCKET NO. SPU-99-27
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**ORDER GRANTING AND DENYING MOTIONS TO COMPEL
AND DENYING REQUEST FOR ORDER ON DISCOVERY**

(Issued November 4, 1999)

BACKGROUND

On September 20, 1999, Qwest Communications Corp., LCI International Telecom Corp., USLD Communications Inc., Phoenix Network Inc., and Qwest Communications International Inc. (collectively "Qwest"), and U S WEST, Inc. (U S West), filed a joint application for an order approving the proposed merger of Qwest Inc. and U S West (collectively, the "Applicants") pursuant to IOWA CODE §§ 476.76 and 476.77 (1999). The filing has been identified as Docket No. SPU-99-27.

On October 6, 1999, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed its first and second motions to compel discovery from Applicants. The first motion to compel concerned Consumer Advocate data request No. 35, which inquired whether either U S West or Qwest is presently communicating regarding merger or acquisition with any third company with assets in excess of \$500 million. The data request was sent on September 9, 1999. The September 22 response essentially relied on corporate policy for refusing to answer.

Consumer Advocate asks the Utilities Board (Board) to order the Applicants to respond within five days of the date of the Board order.

Also on October 6, 1999, Consumer Advocate filed its second motion to compel, relating to data request No. 11, again seeking a Board order requiring a response within five days of the date of the order. By that data request, sent on August 11, 1999, Consumer Advocate sought a copy of a side letter to the U S West/Qwest merger agreement. The side letter, dated July 18, 1999, concerns certain executive positions in the proposed merged entity. Applicants' response, dated September 2, 1999, objected to the data request on the grounds of relevance, stating the side letter does not identify individuals and offering that "[a]t such time as these management positions are made public, a copy will be provided to the OCA pursuant to the protective agreement." Applicants do not indicate why the information would be provided pursuant to the protective agreement after it has been made public.

On October 15, 1999, Consumer Advocate filed a third motion to compel, asking the Board to order Applicants to answer data request Nos. 59 and 65. Those requests were served on September 23, 1999, making the responses due on September 28, 1999, pursuant to IOWA ADMIN. CODE 199-32.9(2) (1999). As of October 15, 1999, no responses had been received. Data request No. 59 seeks projected capital expenditures for Qwest and U S West for the next five years and the source of financing for those expenditures. Data request No. 65 seeks the

workpapers and assumptions supporting part of the direct testimony of Applicants' witness Peter Cummings.

Consumer Advocate then filed, on October 20, 1999, a supplement to its third motion to compel, indicating the Applicants responded to data request Nos. 59 and 65 on October 19, 1999, by offering to make responsive documents available for Consumer Advocate's review at U S West's offices in Des Moines. Consumer Advocate objects to the proposed procedure, alleging it would be cumbersome, would complicate use of the information, and would impose additional costs by effectively forcing Consumer Advocate to sit and copy numbers by hand. Consumer Advocate argues the proposed process is unacceptable in this case, where the analyst who most needs to review these documents is located in another state. Finally, Consumer Advocate argues the Applicants are engaged in dilatory conduct destructive of the administrative process, as evidenced by their actions in delaying the original responses beyond the time allowed by Board rules and then, when confronted with a motion to compel, proposing an "unauthorized, cumbersome and unworkable substituted discovery process."

On October 21, 1999, Applicants filed their response to the first and second motions to compel. They state that on October 20, 1999, they produced the side letter regarding executive positions in response to data request No. 11 and that on the morning of October 21, 1999, they produced a confidential response to data

request No. 35. Accordingly, they argue "no Board action is necessary to resolve the issues brought before the Board by the OCA."

On October 28, 1999, Consumer Advocate filed a reply regarding the first motion to compel, a status report on other discovery, and a request for an order on discovery. With regard to the first motion to compel, Consumer Advocate states that the alleged supplemental response to data request No. 35, regarding other possible merger discussions, adds nothing to the original response and still refuses to answer the question asked. Further, Consumer Advocate points out that Applicants make no argument that the protective agreement already in place between Consumer Advocate and Applicants is in any way inadequate to address the confidentiality concerns of the Applicants. Consumer Advocate again argues the Applicants' actions appear to be motivated by a desire to delay and obstruct review of the proposed merger.

With regard to other discovery, Consumer Advocate finds the Applicants' response to data request No. 11 to be adequate and therefore withdraws its second motion to compel. As for the third motion to compel, Consumer Advocate notes that on October 20, 1999, Applicants responded to data request No. 79 by again offering only to make responsive documents available at U S West's offices in Des Moines. Data request No. 79 seeks supporting workpapers and assumptions for another part of the prefiled testimony of Applicants' witness Peter Cummings, relating to revenue and EBITDA projections for the merged company. Consumer Advocate then states

that, as of the date of the report, Applicants are late with responses to 22 other Consumer Advocate data requests. Consumer Advocate therefore asks the Board to order the Applicants to provide timely responses to all data requests, pursuant to Board rules, or face the possibility of (a) civil penalties pursuant to IOWA CODE § 476.51 (1999), (b) an order requiring Applicants to pay Consumer Advocate's expenses in obtaining the order regarding discovery, or, in an extreme case, (c) an order dismissing the joint application without prejudice.

On October 29, 1999, Applicants filed a response to the third motion to compel and the supplement to that motion. Applicants argue that data request Nos. 59 and 65 seek production of confidential records consisting of "highly sensitive financial information, the release of which would give advantage to competitors. Applicants also argue that Consumer Advocate's failure to even try their proposal to produce the documents for review at U S West's offices in Des Moines is unreasonable. Applicants therefore ask the Board to deny the third motion to compel.

Finally, on November 2, 1999, Applicants filed a joint response to Consumer Advocate's October 28 filing. Applicants state that they have been responding to a relatively large number of discovery requests in a variety of jurisdictions and that Consumer Advocate has made the task more burdensome by the timing of its data requests. With respect to the first motion to compel, Applicants state that strong public policy supports Applicants' position that they should not be required to

respond to data request No. 11, citing certain policies of the Securities and Exchange Commission. With respect to the third motion to compel, Applicants assert Consumer Advocate should try the option of having records produced at the Des Moines office of U S West before rejecting the option. Finally, as a status report, Applicants state that by the close of business on November 2, 1999, they will have responded to all but seven of Consumer Advocate's data requests.

RULINGS

A. The First Motion To Compel

The Board will deny the first motion to compel. The Board is persuaded that information regarding possible other mergers or acquisitions is particularly sensitive; more important, however, the Board finds that the requested information is irrelevant to this proceeding. It is true, as Consumer Advocate points out, that in previous orders the Board has found that the existence of other major proposed mergers, not yet presented to the Board for approval, may have a material impact on a proposed merger that is pending before the Board. In re Global Crossing Ltd. and Frontier Corp., Docket No. SPU-99-16, "Order Granting Motion To Dismiss" at pages 4-5 (issued June 25, 1999). However, in that docket the second merger was public information and was already affecting the companies involved in the merger that the Board was reviewing. The second merger was clearly relevant to the first. In this case, in contrast, Consumer Advocate seeks information regarding possible future mergers that may not have proceeded beyond the earliest inquiries and, by

definition, are not yet public information. As such, these hypothetical future mergers are not material to this docket. If some such transaction becomes reality and is the subject of a public announcement, the Board will consider appropriate action at that time, but for the present the requested information is irrelevant.

B. The Second Motion To Compel

Consumer Advocate has withdrawn its second motion to compel, so no ruling is necessary.

C. The Third Motion To Compel

The Board will grant the third motion to compel. The Board finds that the procedure proposed by Applicants (review of sensitive documents at the offices of the party producing the documents, rather than by supplying copies to the requesting party) may be a reasonable alternative discovery mechanism in some situations, but only if both parties agree to its use. Applicants object that Consumer Advocate's failure to even try their proposal is unreasonable, but Consumer Advocate offers a reasonable explanation for its position. The fact that Consumer Advocate's analyst for these issues is located in another state makes production of the documents in Des Moines a cumbersome and costly process when compared to the normal method of producing copies of the relevant documents.

Further, Applicants have not offered any reasonable explanation why the existing confidentiality agreement between Consumer Advocate and Applicants fails to provide adequate protection to the information being sought by Consumer

Advocate. In their filing of November 2, 1999, Applicants accuse Consumer Advocate of breaching the confidentiality agreement by providing copies of confidential documents to the analyst without first providing notice to Applicants. However, it is apparent that Consumer Advocate was merely providing the records to an outside analyst retained for purposes of this case. The Board finds that the confidentiality agreement between Consumer Advocate and Applicants must have contemplated production of confidential documents to Consumer Advocate's witnesses and analysts, both employees and outside consultants; otherwise, Consumer Advocate is left with a pile of confidential papers and no one to use them.

Applicants have not shown that the confidentiality agreement is inadequate to protect their interests in maintaining the confidential nature of the requested information. Absent such an explanation, the Board will direct production of the requested information in a manner consistent with the usual discovery practices in Board proceedings, by requiring the Applicants to provide copies of the responsive documents or other materials to the Consumer Advocate within five days of the date of this order.

D. The Request For An Order On Discovery

Finally, Consumer Advocate asks the Board to issue a general order on discovery, directing the Applicants to file timely responses to data requests, potentially enforced with civil penalties, orders assessing costs, and dismissal of the application. The Board finds such an order should be, and is, unnecessary. All

parties to this proceeding are already subject to an obligation, pursuant to IOWA ADMIN. CODE 199-32.9(2), to respond to all data requests within five days of the date of service. A Board order directing compliance with the rule will not add anything to the requirement of the rule. The Board understands it is not always possible for parties to comply with this time requirement, and the Board expects the parties before it to discuss those problems as soon as they arise and to make good faith attempts to negotiate acceptable alternatives before resorting to the Board for a formal resolution. Nonetheless, the rule is clear and applies to all data requests issued in this docket. If the Applicants are unable to respond to a particular request or set of requests in compliance with the rule, then they should be initiating discussions with Consumer Advocate to negotiate an alternative arrangement. Simple failure to respond is not acceptable and could have serious consequences if the result is to materially impede the progress of this case, which must be resolved within a relatively short time frame.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The "First Motion To Compel," filed by Consumer Advocate on October 6, 1999, is denied.
2. The "Second Motion To Compel," filed by the Consumer Advocate on October 6, 1999, has been withdrawn.

3. The "Third Motion To Compel," filed by Consumer Advocate on October 15, 1999, and supplemented on October 20, 1999, is granted. Applicants shall provide responses to Consumer Advocate data request Nos. 11-059, 11-065, and 14-079 within five days of the date of this order.

4. The "Request For Order On Discovery," filed by Consumer Advocate on October 28, 1999, is denied.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr. /s/ Diane Munns
Executive Secretary

Dated at Des Moines, Iowa, this 4th day of November, 1999.